

No. 14,078

United States Court of Appeals
For the Ninth Circuit

WEST COAST PRODUCTS CORPORATION,
Appellant,

VS.

SOUTHERN PACIFIC COMPANY, a corpo-
ration,
Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

BRIEF FOR APPELLANT.

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FILED

MAR 11 1954

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Journal of the
Royal Society of Medicine



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ABSTRACT OF CASE.

The appellee brought this action in the District Court for the Northern District of California to recover claimed additional freight charges and in its complaint (Tr. 4-7) alleged that the appellant became indebted to it in the sum of \$1475.51 for undercharges on various shipments of olives alleged to be salt cured olives transported by the appellee and its connecting carriers at the request of appellant from Orland, California, to various eastern destinations, and annexed to the complaint is an exhibit "A"

setting forth the various charges. It further alleges that the transportation charges were due on account of the transportation of said shipments pursuant to the plaintiff's tariffs duly posted, published and on file with the Interstate Commerce Commission, whereunder the proper freight charges were \$5,447.64, on account of which there had been paid the previous freight charges amounting to \$3972.13, and the appellee prayed for judgment for the difference of \$1475.51, together with \$44.26 taxes to the United States of America under provisions of the Internal Revenue Act.

The answer (Tr. 12-14), of the appellant denies that the olives were salt cured and alleges that the olives transported by the appellee for the appellant were oil-coated olives, and denies that any amount whatsoever is due or unpaid or that the appellee is entitled to any additional freight charges.

A trial was held and the evidence at the trial was without contradiction or dispute. The method of preparation of the olives and the nature and type of olives were covered entirely by the testimony of Amadeo Paoni, the vice-president of the appellant, who was in charge of the preparation and shipment of the olives. Subsequently the Court rendered a brief opinion (Tr. 58) in which it held that the tariff classification "Olives, salt-cured, not preserved in liquid" was applicable to the olives in question and

that the plaintiff was entitled to recover judgment. Findings of fact and conclusions of law (Tr. 59-63) in accordance with the order for judgment were signed and filed and judgment (Tr. 63-64) was filed and entered. A motion for a new trial (Tr. 65) was made and was denied by the Court (Tr. 66).

The broad question on this appeal is whether the trial Court erred in its judgment and findings on the undisputed evidence that the olives in question were covered by Item 5670 of the Trans-Continental Freight Bureau Eastbound Tariff No. 35, which reads "Olives, salt cured, not preserved in liquid" and were not covered by Item 3800 of said Tariff which reads "Olives, canned or preserved, in juice or in syrup, or liquid other than alcoholic". It is the contention of the appellant that the olives were covered by Item 3800 and that, therefore, the judgment should be reversed.

SUMMARY OF EVIDENCE.

The only evidence which was introduced with reference to the manner in which the olives here in question were processed, packed and shipped was that given by Amadeo Paoni, vice-president of appellant, who was called by the appellee as an adverse witness and who testified substantially as follows:

That the olives in question were received sometime in the month of December and the first thing he did

with them was to run them through a grader (Tr. 94) for size and to take out the olives that were bad; that he then washed them to take off the dirt and dust and put them in a wooden bin about 6 x 6 x 5 feet and put rock salt in the bin by first putting a layer of olives about 4 or 5 inches thick and then about 1 inch of salt on that layer, and then more olives and more salt until they got to the top; and by leaving the olives in the bin, together with the salt for a length of time dependent upon the weather (Tr. 95), the shortest length of time being 3 or 4 weeks and the longest time 5 or 6 weeks, the salt extracts the water from the olives; that the olives are then taken out of the bin and the salt shaken off by a machine (Tr. 96) so that there is no longer any salt on the outside of the olives; that they then dipped the olives in fresh water to completely dissolve the salt, and that they are then spread out on a table and oil is put on them; that for about 100 pounds of olives a one-half gallon of olive oil is used; that the olives are placed on a table and are rolled around in the oil to get the salt out of the olives and to place a coat of oil on every olive; that they are then placed in kegs containing 100 pounds net of olives (Tr. 97); that after the olives are filled into the keg, the keg is first capped with a layer of paper so that the olives do not come in contact with the wood, and then a wood cover put over that; that the keg is about 22 inches high

(Tr. 98) and about 16 inches in diameter; that between the oil and the liquid that comes from the olives themselves there are about 6 or 8 inches of liquid at the bottom of the keg; that the olives themselves have liquid (Tr. 99); that he himself followed this process with respect to the particular olives here in question; that the salt extracts the water from the olives (Tr. 100).

Under cross-examination by appellant's Counsel Mr. Paoni testified that the purpose of manipulating the olives with oil is that after the olives are covered with oil it keeps the olives so that they do not spoil; that if the olives are not covered with oil they dry up and do not keep their flavor; that the purpose is to preserve the olives; that when the olives are put in the barrel the olives have moisture in them which comes out from the olives and mixes with the salt and makes a juice to preserve the olives (Tr. 104); that the juice thus formed goes to the bottom of the barrel; that the barrels are turned and they keep turning the barrels and the juice is going up and down and keeps moisture upon the olives so that the olives are preserved in the juice (Tr. 105).

Mr. Paoni further testified that he supervised the processing and shipment of the olives in question; that the process used was that given in answer to the questions propounded to him; that the four carloads of olives here in question were processed, coated with oil, put in kegs, and shipped in the

manner which he has described (Tr. 109); that all the appellant's oil-coated or oil-cured olives were processed in the same manner which he has described (Tr. 108); that the olives here in question were processed and immediately thereafter shipped and that the length of time between processing and shipping does not exceed 10 days; that if necessary to obtain enough olives to make up a car they use other type olives in addition to the type in question (Tr. 110).

On redirect examination Mr. Paoni was asked if he did not put olive oil on the olives, whether they would tend to shrivel up and he answered that they are shriveled already when they are taken out of the brine and that the olive oil does not take any of the shriveling out of them. He further testified that it is not necessary to give instructions to the purchasers of these olives about turning the kegs as they already know that the kegs are to be turned as if they do not turn the kegs the oil does not get on the olives and the top gets dry, and that they should be turned once a week or at least once every two weeks (Tr. 113-114).

On re-cross-examination he testified that if the olives here in question were not coated or preserved in olive oil they would dry and become mouldy (Tr. 114).

The witness Krackov was called as part of the defendant's case. He is a broker dealing particularly in olive oil and olives, doing business under the name of Transoceanic Sales Co., having his prin-

cipal office in New York City. He has been engaged in the olive oil and olive business for 25 years and sold all types of olives, both imported and domestic (Tr. 152). He is familiar with the olives in the shipments here in question and with the manner of curing the same. He testified that the use of rock salt in this type of olives does not extract all the water (Tr. 154); that before the olive is packed moisture has not been extracted in its entirety; that about one-half of the moisture is left in the olive and that the effect of the olive oil is to preserve the olive against mould; that he has seen the kegs after they have been shipped and have been opened at the conclusion of the shipment and that he has found that the olives have been preserved in the liquid and juice of the olives and are fresh and edible (Tr. 155). That in the trade and in his experience with selling olives and with the shipment of olives and his general experience in the olive business as a whole preserving in liquid does not necessarily mean immersing in liquid (Tr. 156).

The foregoing constitutes all of the testimony which is material on this appeal and all of the testimony which was used by the trial Judge in reaching his determination.

STATEMENT OF POINTS ON WHICH APPELLANT RELIES.

It is the contention of the appellant that the rendition of judgment in favor of appellee and against the appellant is not justified by the record; that the olives in question were preserved in juice or liquid other than alcoholic and were not olives, salt cured, not preserved in liquid; that the proper freight charge was that actually made by the plaintiff under Item 3800 of the Tariff in question.

It is our further contention that the facts in the case are undisputed; that the trial Court reached an improper conclusion upon the undisputed facts; that the appellant is bound only by a fair and reasonable conclusion of the tariff, and that this Honorable Court is not bound by the findings of the trial Court on the undisputed facts; that the burden was on the appellee to show that the olives were of a character which called for a higher freight rate and that it failed to meet the burden and that, therefore, the judgment should be reversed and the United States District Court ordered to enter judgment in favor of the appellant.

The trial Court's findings are not entitled to much weight as the facts are undisputed and were so declared by the trial Judge.

Primarily, we desire to call attention to the fact that a jury was impaneled and heard the testimony offered by the plaintiff, but at the conclusion of the plaintiff's testimony the Court stated that there was no question of fact involved in the case at all; that

there was no question for the jury; and that it was the duty of the Court to decide which tariff should apply (Tr. 140-144); that the method by which the olives were packed and prepared is undisputed (Tr. 142). The trial Judge then stated that in his opinion it was entirely a question of law and that he would discharge the jury, and he thereupon sent for the jury and stated to it that he found that it was proper in this case for the Court to decide the matter as the case was a matter of law, and for that reason the jury was discharged (Tr. 150-151).

**THE COURT OF APPEALS SHOULD DISREGARD THE
FINDINGS IN THIS CASE.**

While Rule 52 (a) provides that the findings of the trial Court shall not be set aside unless clearly erroneous, it has been held that to the extent that the findings are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, they are not binding upon the Court of Appeal.

Aetna Life Ins. Co. v. Kepler (1941), 8 Cir.,
116 F. (2d) 1, 5;

Sanders v. Leech (1946), 5 Cir., 158 F.
(2d) 486;

United States v. Still (1946), 4 Cir. 120 F.
(2d) 876, 878, cert. den. 314 U. S. 671, 62
S. Ct. 135, 86 L. Ed. 537;

Campana Corporation vs. Harrison (1940), 7
Cir., 114 F. (2d) 400, 405-406.

In the present case, as we have seen, there is no conflict in the evidence. The findings of the trial Court, which we question on this appeal are entirely unsupported by any evidence whatever and were induced by an erroneous view of law. Therefore, they are not binding on this Court and should be set aside as all of the testimony shows that the Court selected the wrong tariff and improperly granted a judgment to the appellee contrary to the entire weight of the evidence.

TARIFFS AND RATES ARE PROMULGATED AND ESTABLISHED FOR THE USE OF LAYMEN AND THE INTERPRETATION SHOULD BE PRACTICAL.

In *Sonken-Galamba Corporation vs. Union Pac. R. Co.*, 145 Fed. (2d) 808, the Court states the following:

“In the discharge of our limited responsibilities, we must not forget that tariffs and rates are promulgated and established for the use of laymen in the course of their business affairs, and the interpretation must be susceptible of practical and ready application. * * * The shipments in question were accepted by the carrier as scrap iron, and freight rates were assessed and collected accordingly. The burden is therefore upon the carrier to show that at the time the material was shipped, it had a recognized commercial value for purposes other than remelting.”

It is respectfully submitted that this rule of law is correct and is supported by numerous authorities set

forth in that case, and that under the application of the rule, the appellee having accepted the shipment in question as of the character specified under Item 3800 of its tariff and having assessed and collected the transportation charges based upon the rates specified for that classification, the burden was upon the appellee to show that at the time the olives were shipped they were of a character which called for a higher freight rate and the appellee has failed to meet that burden.

The olives in question being included in more than one tariff designation, the appellant was entitled to select the designation which was the more specific; (*United States v. Gulf Refining Co.*, 268 U. S. 542; *DeRamus vs. Mengel Co.*, 74 Fed. Supp. 425) and, where two tariff descriptions are equally appropriate, the shipper is entitled to the lower rate (*American Ry. Express Co. vs. Price Bros.*, 54 Fed (2d) 67).

The appellant is not bound by the carrier's intention or by its canons of construction in the interpretation of its tariff. The shipper is bound only by a fair and reasonable construction of the rules. The law compels carriers to publish and post their schedules of charges upon the theory that they will be informative. A shipper who consults them has a right to rely upon their obvious meaning. He cannot be charged with knowledge of the intention of the framers or the carrier's canons of construction or of some other tariff not even referred to in the one carrying the rate (*Swift v. U. S.*, 255 Fed. 291).

A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that an ordinary businessman can understand it, and, in connection with the rate sheets, can determine for himself what he can be lawfully charged for the transportation (*Swift v. U. S.*, supra; *Sonken-Galamba Corporation vs. Union Pac. R. Co.*, supra). The tariff being written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier (*DeRamus v. Mengel Co.*, supra).

The ultimate question of whether the shipments were properly classified under the tariff involves an application of the facts to the definition of the carrier's freight classification for determining the freight rate applicable, and the only application which can be reasonably made in this case is that the proper classification comes under Item 3800. It prescribes no minimum amount of liquid required to bring the olives under this classification. The trial Judge seemed to indicate that it is his view that in order that the olives be preserved in juice or syrup or liquid they must be immersed therein. There is no basis for this interpretation under Item 3800. It simply states "Olives, canned or preserved, in juice or in syrup, or liquid other than alcoholic". Item 5670, on the other hand, states "Olives, salt cured, not preserved in liquid". The words, "salt cured", in and of themselves are not the all-determining factor for, immediately following those words, we find the

words, "not preserved in liquid". Item 3800 does not exclude salt cured olives. The language in that Item is broad enough to include olives cured in any manner. The only requirement necessary to bring the olives under that classification is that the olives be canned or preserved in juice or in syrup, or in liquid other than alcoholic.

Webster defines the word "preserve" as follows: "To save from decay by the use of some preservative substance as sugar, salt, etc.; to prepare so as to prevent decomposition or fermentation as by seasoning, canning, etc." The testimony shows that the liquid was placed in the barrels and was sufficient to preserve the olives and is, therefore, sufficient to establish the fact that the olives in question were preserved in liquid.

From the foregoing it is respectfully submitted that there is no doubt that the provisions of Item 3800 are applicable to the olives here in question.

CONCLUSION.

Upon the basis of the foregoing it is respectfully submitted that the trial Court upon the undisputed facts applied the wrong tariff to the olives in question; that clearly the evidence shows that the olives were preserved in juice or liquid other than alcoholic and that, therefore, the judgment should be reversed. Since the evidence is undisputed there is no

purpose in remanding the cause for a new trial, but upon the evidence the trial Court should be ordered to enter judgment in favor of the appellant for its costs.

Dated, San Francisco, California,
March 8, 1954.

Respectfully submitted

ALBERT PICARD,

Attorney for Appellant.